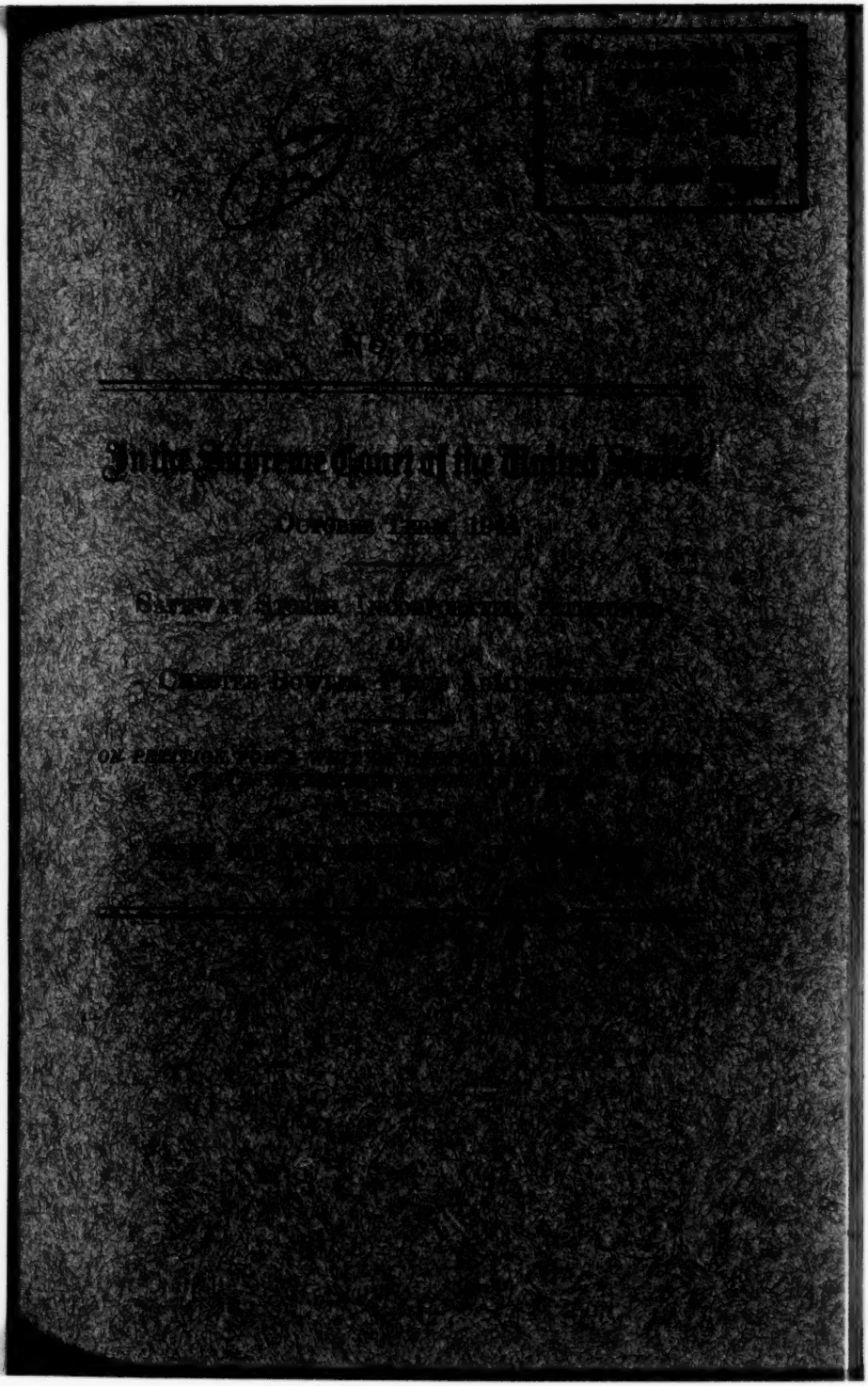

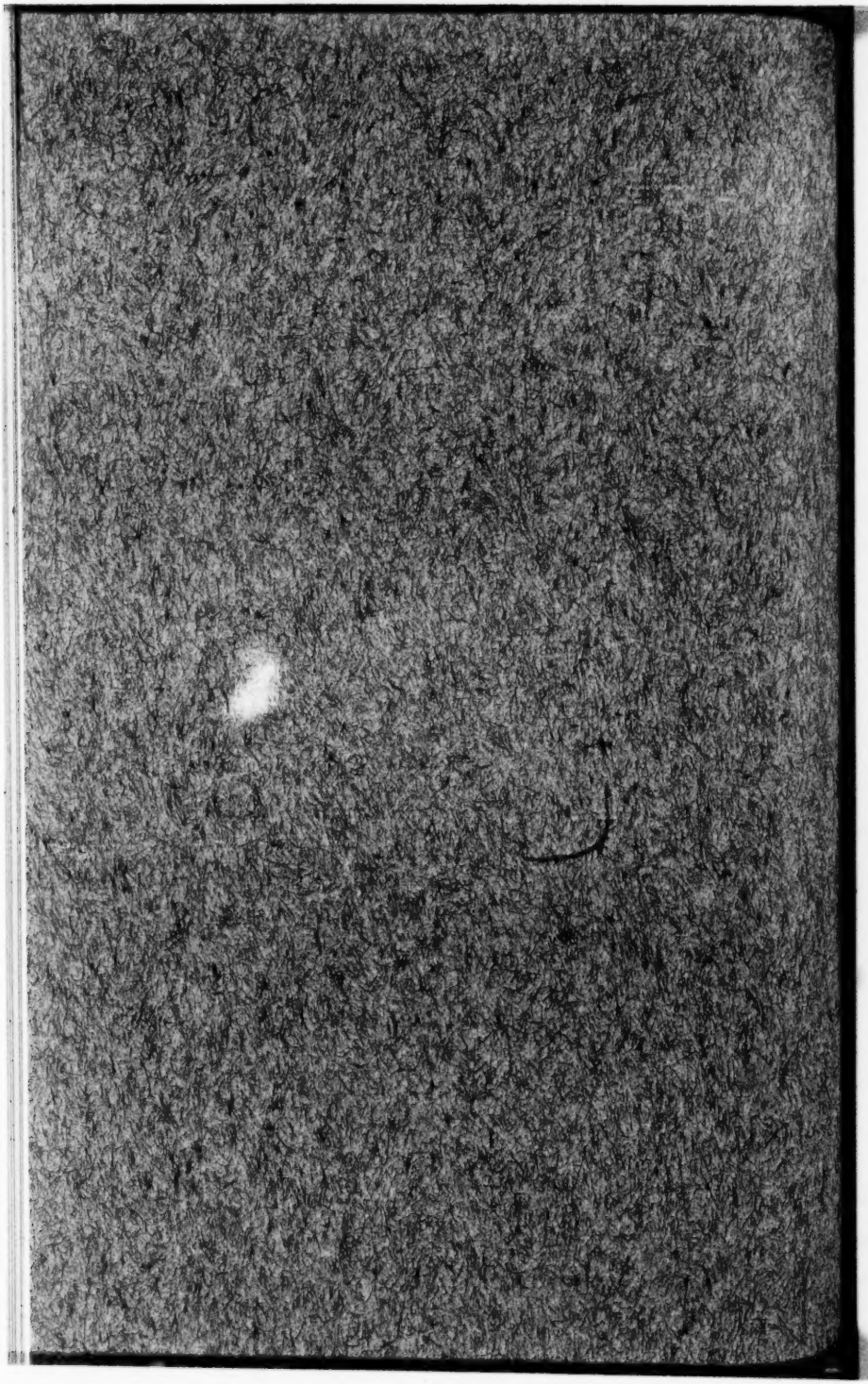

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 798

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 593-604) is reported at 145 F. (2d) 836.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered November 29, 1944 (R. 605). The petition for a writ of certiorari was filed December 29, 1944. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. III, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess. (here-

in sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

(1) Whether the classification of retail food stores embodied in the applicable maximum price regulations is arbitrary or capricious, or requires changes in business practices established in the industry in contravention of Section 2 (h) of the Act.

(2) Whether the applicable maximum prices fairly and adequately compensate retail food stores for the distributive functions they perform so as to comply with the statutory requirement of generally fair and equitable prices.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra,* pp. 16–22. The maximum price regulations involved and pertinent amendments thereto are printed in the Federal Register (8 F. R. 6428, 9395, 9407, 12611, 15251, 17369, 17370; 9 F. R. 3510, 4214, 9719, 10258, 12589, 12590).

STATEMENT

On May 14, 1943 the Price Administrator issued Maximum Price Regulation No. 390 and on July 8, 1943 issued Maximum Price Regulations No. 422 and 423, which together prescribed maximum

prices for grocery and related items (except meats) sold by retail food stores. All of these regulations followed the same general pattern, subdividing retail food stores into the four following groups for pricing purposes: Group 1—independent stores with annual sales volume of less than $50,000; Group 2—independent stores with annual sales volume of from $50,000 to $249,999; Group 3—chain stores with annual sales volume of less than $250,000; and Group 4—chain or independent stores with annual sales volume of $250,000 and over (R. 48, 63–68).

Maximum Price Regulation No. 390 established specific maximum prices on soaps and cleansers for each group of retail food stores and Maximum Price Regulations No. 422 and 423 established maximum percentage markups over cost for each group for the various grocery items sold by retail food stores. The specific maximum prices and maximum percentage markups over cost for each store group were based upon voluminous data gathered by the Bureau of Labor Statistics, showing the margins over cost which each group of stores had customarily obtained (R. 47, 63, 158, 183–212, 301–37, 362–70, 390–95, 474–77).

Six protest proceedings were instituted before the Price Administrator by petitioner under Section 203 (a) of the Emergency Price Control Act, attacking the classification of retail food stores upon which the system of maximum retail food prices is based, and the adequacy of the compensa-

tion provided for the distributive functions which petitioner performs (R. 1, 20, 86, 103, 119, 137). The Price Administrator incorporated detailed economic data and other facts into the record of the proceedings, including certified statements by the Acting Commissioner of Labor Statistics (R. 43–5, 153–57, 181–3, 400–15), answers to interrogatories propounded to the Price Administrator by petitioner (R. 379–399), and studies of the retail chain store industry's and petitioner's profits under the regulations and in pre-war years (R. 185–187, 213–229, 372–378, 416–422). In the meantime, a series of amendments were added to Maximum Price Regulation No. 422 providing additional compensation for special distributive functions performed by the industry (R. 356–357, 601–602). Thereafter, petitioner's protests, having been consolidated into two groups, were denied by the Price Administrator insofar as relief had not been granted by these amendments (R. 338–378).

Petitioner thereupon filed complaints with the United States Emergency Court of Appeals in accordance with Section 204 (a) of the Emergency Price Control Act (R. 516, 532), where they were consolidated for hearing and disposition (R. 579). The court rejected all of the objections advanced by petitioner, and dismissed the complaints (R. 593–605).

ARGUMENT

1. One of the principal contentions advanced by petitioner is that the classification of retail food stores adopted in the applicable regulations is improper since not framed in terms of "functions performed and services rendered" (Pet. 15). But for present purposes it is of controlling importance that petitioner has never suggested how such a system of classification of retail food stores could be devised or put into practical operation. Nor has petitioner made any substantial attack upon the Price Administrator's determination, in which the court below concurred (R. 595–596), that because of the variations and gradations in functions and services from customer to customer and transaction to transaction, a classification of retail food stores expressly framed in such terms would be wholly insusceptible of effective administration. What was said by Mr. Justice Brandeis in *Groesbeck* v. *Duluth, S. S. & A. Ry. Co.*, 250 U. S. 607, 614–615, is pertinent here: "* * * experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate."

Indeed, petitioner's only suggestion has been that classification of retail food stores for price control purposes be wholly abandoned, and it has heavily relied upon a recommendation made by representatives of the industry that for all re-

tail stores there should be "one ceiling price only—highest level". The Price Administrator gave careful consideration to the recommendation and, for reasons fully set forth in his opinion entered in the protest proceeding, concluded that its adoption would not be consistent with fair and effective price control (R. 346–349). The considerations requiring rejection of this suggestion were well summarized in the opinion of the Emergency Court of Appeals which stated (R. 594–595):

> The Administrator asserts, and we think with good reason, that such action on his part would have thwarted the purposes of the Emergency Price Control Act and would have opened the way to a very substantial inflationary increase in the cost of food products since it would have permitted the vast multitude of low-cost food stores to increase their existing levels of prices to those of the highest price stores in their respective communities. The complainant's contention that the forces of competition would have prevented such price increases loses its force when we consider that such factors do not operate normally in an economy of scarcity coupled with excess purchasing power such as obtains under war conditions in this country at the present time. It might have been equally disastrous for the Administrator to have placed a single price ceiling on food products at less than the highest level. Such

> action might well have forced a large number of small neighborhood retail food stores out of business entirely.

It is significant that the same views were expressed by the counsel to the Food Industry War Committee in the hearings leading to extension of the Act. *Hearings before the Committee on Banking and Currency on H. R. 4376 (78th Cong. 2d Sess.)*, Vol. 1, p. 408 (R. 595).

The record amply supports the Price Administrator's determination that the method of classification employed in the regulations, while having the precision and definiteness necessary for effective administration, is also well adapted to the needs of the retail food industry (R. 72). The record shows that the Price Administrator adopted a method of classification which had been used by the trade and by research organizations prior to price control (R. 73–75). Although framed in terms of sales volume and affiliation with other retail outlets, the classification in substance reflects the different services performed by the major types of retail food stores (R. 74–75, 596–597). Moreover, to insure the fairness of the classification employed, the regulations contain provisions for the reclassification of a retail store which can show that its services and historic margins are typical of the group having the higher maximum prices (R. 481–482). In view of all these considerations, it can hardly be urged that the Price Ad-

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ministrator was arbitrary or capricious either in rejecting the suggestion that classification of retail stores for price control purposes be abandoned, or in the selection of the method of classification employed in the retail food regulations.

The further contention is advanced that this classification in its application to petitioner runs afoul of the prohibition of Section 2 (h) of the Act against requiring changes in "business practices * * * established in any industry". This contention is based upon the fact that some of petitioner's stores located in the same trading area fall in Group 3 and the others in Group 4. Petitioner points out that consequently, if all of its stores are to sell at ceiling prices, it must abandon its practice of selling at the same price in all stores in the same trading area.

As is shown by the opinion of the court below, this contention is subject to a number of defects (R. 597). As the record reveals, the regulations do not require petitioner to modify, nor has petitioner in fact modified its established one-price policy (R. 5, 24, 68, 76).[1] Equally fatal is the fact

[1] The subsidiary contention that retention of its one-price policy under the regulations has been oppressive (Pet. 21) is belied by the petitioner's unprecedented profits from its operations under these regulations (R. 603–604). As the court observed, maintenance of petitioner's one-price policy under the regulations does not require any change in its policy with respect to competitive price levels, since petitioner asserts that it customarily sells in all its stores at the lowest lawful prices charged by competitors in the same trading area (R. 597).

that petitioner has not shown that the practice in question is shared by any other member of the industry (R. 4, 11, 18, 29–30, 36, 76, 597). The contention that the practice of a single seller may be "established in the industry" within the meaning of Section 2 (h) runs counter to both the clear meaning of the language of the provision and its legislative history.[2] It is apparent that there is no substance to petitioner's contentions that the classification employed in the retail food regulations is inconsistent with the requirements of the Act.

2. Petitioner presents a number of arguments designed to show that the maximum prices established for the different groups of retail food stores are unfair and fail adequately to compensate petitioner for its distributive functions (Pet. 22–32). As the court below observed, these contentions assume "a certain air of unreality" in view of the lack of concrete evidence presented by petitioner and in the light of the evidence introduced by the Price Administrator of the financial results of operations under the regulation (R. 213–229, 372–378, 416–422, 603–604). Al-

[2] In the debates upon the provision which became Section 2 (h) of the Act, Senator Taft stated: "* * * I do not think the provision would prevent the Administrator from ruling out a practice adopted by a particular firm even if it had indulged in it before. It says: 'Practices * * * established in any industry.' I should think the provision probably applied only to an industry-wide practice which the Administrator could not change * * *." 88 Cong. Rec. 103 (1942).

though attacking the adequacy and fairness of the maximum margins provided by the regulations, petitioner presented no evidence of the margins which either it[3] or other members of the industry had customarily received, or of the earnings permitted under the regulations. Petitioner's argument upon this score consisted in part of abstract comparison of the maximum markups allowed the different groups of retail stores, and in part of criticism of the statistical procedures of the Bureau of Labor Statistics and the Price Administrator in the compilation of the underlying margin data and its use in preparing the regulations.

Petitioner's arguments are in the main derived from a report prepared for it by a firm of accountants who made an exhaustive examination of the margin data collected by the Bureau of Labor Statistics and of the Price Administrator's use of the data in preparing the regulations. A number of criticisms were advanced, with respect both to the adequacy of the data and the statistical procedures employed by the Price Administrator in evaluating the data prior to establishing the maximum markups. These criticisms,

[3] Petitioner set forth the margins it had previously received on two selected items in its stores in Butte, Montana (R. 244–5). However, from another proceeding filed by petitioner with the Price Administrator it appeared that the costs and margins in the stores in Butte were among the highest and that the items of evidence offered by petitioner did not, to say the least, present a representative picture (R. 364–365).

however, were based upon a series of factual errors and misapprehensions, which although exposed in detail by the Acting Commissioner of Labor Statistics (R. 400–415) and by the Price Administrator (R. 362–367, 390–397), are repeated in petitioner's brief. The state of the record and the lack of substance to these various contentions [4] are fairly summarized in the opinion of the court below, which stated (R. 598):

> We have examined these criticisms in detail. It will serve no useful purpose to discuss them here. It is enough to say that we find them to be without merit. On the contrary we are impressed with the skill and care with which the enormous task of collecting and collating the data involved in the food margins study was carried through.

Petitioner nevertheless urges that the regulations fail fairly to compensate it for its distributive functions. This contention revolves about

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[4] Contrary to petitioner's suggestion that the Price Administrator based the regulations on inadequate and unrepresentative data, the record reveals that the first collection alone, made in August 1942, involved 58 commodities and covered 8,294 retail outlets in 23 cities (R. 362–3, 415). In subsequent months the scope of the study was enlarged to a point where it involved the collection of data on 98 commodities sold by 11,227 retail outlets in 56 cities throughout the United States, and covered a total of approximately 4,497,930 different prices secured from retailers. As was pointed out by the Acting Commissioner of Labor Statistics, the Food Margins Study was "one of the largest margin and price surveys ever undertaken" (R. 414).

two types of operations: (1) the warehousing of grocery commodities; and (2) certain special pre-warehouse functions such as buying, packing and grading. The arguments with respect to these two types of operations are unsupported by any evidence offered by petitioner with respect to the costs or the customary margins received for these distributive functions. Petitioner concedes that the Price Administrator has added amendments to the applicable regulation giving added compensation for special pre-warehouse functions. Although the program of meeting such special services by means of amendments was instituted shortly after issuance of the retail food regulations (R. 356–357, 601–602), petitioner devotes much attention to criticizing the delay in issuing one of the later in a series of such amendments (Pet. 27, 33). This criticism, regardless of its lack of merit, is not now of legal significance, and petitioner does not appear seriously to rely upon the contentions relating to the special pre-warehouse functions, "insofar as this particular proceeding is concerned" (Pet. 28).

Petitioner does, however, urge that it is denied adequate compensation for its "warehousing" functions. This contention is wholly without substance. As the statements of the Acting Commissioner of Labor Statistics clearly explained, the margin data employed in establishing the regulations reflected the difference between purchase

cost and selling price historically established by each group of stores (R. 157, 182–183).[5] It likewise appeared that the margin data employed in setting the maximum markups for the groups in which petitioner's stores fall reflected the allowance which stores in these groups had customarily made to cover "warehousing" operations, as well as delivery to the retail store and a profit upon the transaction (R. 350–352). It follows, as the court below found, that the regulations were reasonably designed to compensate each group of stores for warehousing, as well as for the other functions which it performs (R. 601–602).

Petitioner, significantly, did not offer any evidence of the effect of these maximum markups upon the financial results of its operations, and objects to the Price Administrator's introduction of this information into the record of the protest proceedings (Pet. 30–32). But it is evident that

[5] By quoting out of context certain phrases from one of the statements of the Acting Commissioner of Labor Statistics, petitioner gives the impression that the underlying margin data did not include allowance for warehousing and delivery to retail stores for the reason that such expenses were "excluded" in collecting the margin data (Pet. 29). But the record clearly shows that the margin data reflect the full margin between the purchase cost and selling price, and that the statement to which petitioner refers is designed to make clear that the margins reflected in the study were not reduced by the amount of items of expense involved in the handling of the merchandise in question (R. 156–7, 181–3, 350–2, 380). The same point was advanced by petitioner in the proceeding below, but was rejected (R. 243, 380, 598).

such information, which in this case shows complainant and other members of the industry to be making unprecedented and increasing profits under the regulations (R. 372–378, 416–422, 603–604), is of the utmost importance in testing the adequacy of maximum prices. That Congress recognized the significance of over-all profits as a measure of the fairness and equity of maximum prices is shown by the report of the Senate Committee on Banking and Currency on the bill which became the Emergency Price Control Act of 1942 (Sen. Rep. No. 931, 77th Cong., 2d Sess., 1942, at 15). The report stated:

> Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of any commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered.

By reason of the complete lack of substance in the charges that petitioner has been subjected to arbitrary or capricious regulatory action, there is no factual framework upon which to raise petitioner's contention that it would be unconstitutional to excuse arbitrary treatment of one seller on the ground that the regulation has not treated other members of the industry unfairly (Pet. 33–34).

Of course, neither the Price Administrator nor the Emergency Court of Appeals made such a suggestion and that court has shown by its decisions that it will set aside a regulation on the ground that it is arbitrary or capricious in its application to individual sellers. *Flett* v. *Bowles*, 142 F. (2d) 559 (1944); *Adams, Rowe & Norman et al.* v. *Bowles*, 144 F. (2d) 357 (1944); *Consolidated Water Power and Paper Company* v. *Bowles*, (E. C. A., Dec. 6, 1944). *Cf. Hillcrest Terrace Corp.* v. *Brown*, 137 F. (2d) 663 (1943). It is sufficient for purposes of this case that the court below properly found that the regulations were arbitrary neither in their application to the petitioner nor to the industry as a whole.

CONCLUSION

The decision below is clearly correct, and does not warrant further review. The petition should be denied.

Respectfully submitted.

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FEBRUARY 1945.